Ha Siaw Shyong v Minister for Local Government and Housing Sarawak & Anor

HIGH COURT (SIBU) — APPLICATION FOR JUDICIAL REVIEW NO SBW-25–1/1 OF 2022 (HC)
CHRISTOPHER CHIN JC
4 MARCH 2022

Civil Procedure — Judicial Review — Leave — Application for leave of judicial review — Whether application cleared threshold for leave of judicial review – Whether there was unjust enrichment — Whether respondent's action was tainted with illegality — Whether respondent's action in making impugned decision by way of notification under subsidiary legislation was valid — Whether applicant's complaint was on diminished liquidated damages — Rules of Court 2012 O 53 r 3

The applicant sought in encl 1 leave for judicial review under O 53 r 3 of the Rules of Court 2012 ('the ROC'). The applicant, as purchaser, signed a sale and purchase agreement dated 18 April 2017 with one, Musyati Development Sdn Bhd as the developer for the purchase of one unit of residence described as Parcel Unit A-13A-15 located on Lot 660 Block 7, Sibu Town District ('the parcel') in a project called Hann's Residence ('the project'). The parcel was to have been handed over to the applicant as the purchaser on or before 30 December 2019 ('the handover date'). In March 2020, the nation went into lockdown because of the Covid-19 pandemic where hardly any corner, person or business in the state of Sarawak was spared its deadly and devastating tentacles. The State Government of Sarawak, in line with the rest of the nation enacted the 'Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Ordinance 2020' ('the Covid Ordinance'). By s 10 of the Covid Ordinance, the first respondent who was the Minister for Local Government and Housing, Sarawak was conferred the power to provide measures to reduce the impact of the Covid-19 disease. Section 6 of the same Covid Ordinance empowered the first respondent to extend any period so allowed by notification in the state *gazette*. The first period of extension of time allowed by the first respondent under the Covid Ordinance was from 18 March 2020 to 31 August 2020 ('the first period'). Then, the first respondent under s 10 of the Covid Ordinance, by a notification dated 22 September 2022, extended the first period from 1 September 2020 to 17 Mac 2022 ('the second period'). The basis of the application for judicial review was founded on the applicant's allegation that the notification dated 22 September 2022 to allow the second period ('the impugned decision') was an illegality, an abuse of power, an error of law, invalid, unreasonable and/or unfair. The issue for the

court's determination was whether the application by the applicant cleared the threshold for leave of judicial review. A

Held, dismissing the application:

(1) It was a logistic impossibility for the first respondent to go into minute detail in each residential project to grant, limit or disallow tailor-made exclusions for every facet of contract or subcontract in the building industry. The allowance and period exclusions allowed by the Covid Ordinance was to give every facet of industry, breathing space or sick leave, while the nation grappled to rein in the adverse health effects of the virus. Given the circumstances, and the fact that the first respondent had regulatory powers over the development industry, it was difficult to see the Covid Ordinance and the impugned decision derived therefrom to be illegal. Just as the impugned decision had allegedly caused harm to the applicant, one had to consider the harm to the greater public had such an impugned decision not been made (see paras 27–29). B C D

(2) The allegation on the part of the applicant that the developer had been unjustly enriched was not substantiated and could at best be viewed as a broad generalised assumption on the applicant's part. It must be noted that the totally unanticipated escalation of costs could not be passed on to the purchaser by virtue of the provisions of the housing laws which were passed to protect purchasers of housing accommodation in the State of Sarawak. No such allegation of increased purchase price was made by the applicant. Such escalation of costs was absorbed by the developer and if anything the profit margin would have been eroded rather than unjustly fattened. The allegation by the applicant of unjust enrichment was not substantiated (see paras 30–32). E F

(3) The applicant sought a review on the impugned decision which involved only the second period and not the first period. The applicant had indirectly condescended to the decision or discretion giving rise to the first period. The applicant must therefore be seen to be selective and had acknowledged that the discretion across the board for the first period was not tainted with illegality (see para 34). G

(4) The notification was not an administrative decision. Whenever a law was challenged, it must be on the ground that the law was substantively ultra vires or procedurally ultra vires of the parent statute and/or constitution. None of those were the grounds of the applicant. The court had the jurisdiction to declare the notification to be invalid if it found that the first respondent had acted ultra vires the ordinance (see para 35). H I

(5) The notification was not an administrative decision. Whenever a law was challenged, it must be on the ground that the law was substantively ultra vires or procedurally ultra vires of the parent statute and/or constitution.

None of those were the grounds of the applicant. The court had the jurisdiction to declare the notification to be invalid if it found that the first respondent had acted ultra vires the ordinance (see para 35).

[Bahasa Malaysia summary

Pemohon memohon dalam lampiran 1 kebenaran untuk semakan kehakiman di bawah A 53 k 3 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Pemohon, sebagai pembeli, menandatangani perjanjian jual beli bertarikh 18 April 2017 dengan satu, Musyati Development Sdn Bhd sebagai pemaju untuk pembelian satu unit kediaman yang berketerangan Unit Parcel A-13A-15 yang terletak di Lot 660 Blok 7, Daerah Bandar Sibu ('petak tersebut') dalam projek yang dipanggil Hann's Residence ('projek tersebut'). Petak tersebut sepatutnya diserahkan kepada pemohon sebagai pembeli pada atau sebelum 30 Disember 2019 ('tarikh penyerahan'). Pada Mac 2020, negara telah disekat keluar masuk kerana pandemik Covid-19 di mana hampir semua tempat, orang atau perniagaan di negeri Sarawak yang tidak terlepas daripada kesannya yang memudaratkan dan menghancurkan. Kerajaan Negeri Sarawak, selaras dengan seluruh negara menggubal 'Langkah Sementara untuk Mengurangkan Kesan Ordinan Penyakit Koronavirus 2019 (Covid-19) 2020' ('Ordinan Covid'). Melalui s 10 Ordinan Covid, responden pertama yang merupakan Menteri Kerajaan Tempatan dan Perumahan, Sarawak telah diberikan kuasa untuk menyediakan langkah-langkah untuk mengurangkan kesan penyakit Covid-19. Seksyen 6 Ordinan Covid tersebut memberi kuasa kepada responden pertama untuk melanjutkan sebarang tempoh yang dibenarkan melalui pemberitahuan dalam *warta* negeri. Tempoh lanjutan masa pertama yang dibenarkan oleh responden pertama di bawah Ordinan Covid adalah dari 18 Mac 2020 hingga 31 Ogos 2020 ('tempoh pertama'). Kemudian, responden pertama di bawah s 10 Ordinan Covid, melalui pemberitahuan bertarikh 22 September 2022, melanjutkan tempoh pertama dari 1 September 2020 kepada 17 Mac 2022 ('tempoh kedua'). Asas permohonan semakan kehakiman adalah berdasarkan dakwaan pemohon bahawa pemberitahuan bertarikh 22 September 2022 untuk membenarkan tempoh kedua ('keputusan yang dipersoal') adalah menyalahi undang-undang, salah guna kuasa, kesilapan undang-undang, tidak sah, tidak munasabah dan/atau tidak adil. Isu untuk penentuan mahkamah adalah sama ada permohonan oleh pemohon melepasi ambang kebenaran semakan kehakiman.

Diputuskan, menolak permohonan:

(1) Ia adalah sangat mustahil dari sego logistik bagi responden pertama untuk menerangkan secara terperinci dalam setiap projek kediaman untuk memberikan, mengehadkan atau tidak membenarkan pengecualian yang dibuat khusus untuk setiap aspek kontrak atau subkontrak dalam industri pembinaan. Elaun dan pengecualian tempoh yang dibenarkan oleh Ordinan Covid adalah untuk memberi setiap

aspek industri, ruang bernafas atau 'cuti sakit', sementara negara bergelut untuk mengekang kesan buruk virus tersebut kepada kesihatan. Memandangkan keadaan, dan fakta bahawa responden pertama mempunyai kuasa kawal selia ke atas industri pembangunan, ia adalah sukar untuk melihat Ordinan Covid dan keputusan yang dipersoal daripadanya adalah tidak sah. Sama seperti keputusan yang dipersoal telah didakwa menyebabkan kemudaratan kepada pemohon, seseorang itu perlu mempertimbangkan kemudaratan kepada orang awam yang lebih besar sekiranya keputusan yang dipersoal tersebut tidak dibuat (lihat perenggan 27–29).

(2) Dakwaan di pihak pemohon bahawa pemaju telah diperkaya secara tidak adil tidak berasas dan boleh dilihat sebaik-baiknya sebagai andaian umum yang luas di pihak pemohon. Ianya perlu diingatkan bahawa peningkatan kos yang tidak dijangka sama sekali tidak boleh diletakkan kepada pembeli berdasarkan peruntukan undang-undang perumahan yang telah diluluskan untuk melindungi pembeli kemudahan perumahan di negeri Sarawak. Tiada dakwaan mengenai kenaikan harga pembelian dibuat oleh pemohon. Peningkatan kos sedemikian telah diserap oleh pemaju dan jika ada margin keuntungan akan terhakis dan bukannya diperkayakan secara tidak adil. Dakwaan oleh pemohon tentang pengayaan yang tidak adil tidak berasas (lihat perenggan 30–32).

(3) Pemohon memohon semakan ke atas keputusan yang dipersoal yang hanya melibatkan tempoh kedua dan bukan tempoh pertama. Pemohon secara tidak langsung bersetuju dengan keputusan atau budi bicara yang menyebabkan tempoh pertama. Oleh itu, pemohon mesti dilihat selektif dan telah mengakui bahawa budi bicara keseluruhan untuk tempoh pertama tidak dicemari dengan kesalahan undang-undang (lihat perenggan 34).

(4) Pemberitahuan tersebut bukan keputusan pentadbiran. Setiap kali undang-undang dicabar, ia mestilah atas alasan bahawa undang-undang tersebut secara substantif ultra vires atau prosedural ultra vires statut dan/atau perlembagaan induk. Tiada satu pun daripada itu adalah alasan pemohon. Mahkamah mempunyai bidang kuasa untuk mengisytiharkan pemberitahuan tersebut sebagai tidak sah jika mendapati responden pertama telah bertindak ultra vires ordinan tersebut (lihat perenggan 35).

(5) Hujah pemohon tertumpu kepada kehilangan ganti rugi tertentu dan ditetapkan pemohon akibat keputusan responden pertama dan tidak membuktikan mengapa atau bagaimana budi bicara yang dilakukan oleh responden pertama adalah salah bukan sahaja kepada pemohon tetapi kepada orang awam secara amnya. Permohonan tersebut boleh dikatakan bermotifkan sepenuhnya oleh kepentingan diri (lihat perenggan 39).]

Cases referred to

Co-operative Central Bank Ltd (in receivership) v Rashid Cruz bin Abdullah & Ors [2004] 1 MLJ 626, CA (refd)

F Hoffmann-La Roche & Co AG and others appellants and Secretary of State for Trade and Industry respondent [1975] AC 295, HL (refd)

MAS Golden Boutique Sdn Bhd v Md Zain bin Abu [1999] 3 MLJ 201; [1999] 3 CLJ 610, HC (refd)

Mkini Dotcom Sdn Bhd & Ors v Chief Judge of Malaya & Ors [2016] 8 MLJ 357; [2015] 9 CLJ 459, HC (refd)

Mohamed Nordin bin Johan v Attorney General Malaysia [1983] 1 MLJ 68, FC (refd)

SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener) [2022] 2 MLJ 356; [2022] 3 CLJ 339, FC (refd)

Tang Kwor Ham & 2 others v Pengurusan Danaharta Nasional Bhd & 5 others (Civil Appeal No M-02–644–03) (unreported) (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)

Legislation referred to

Rules of Court 2012 O 53, O 53 r 3

Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) (Housing Development (Control and Licensing)) Regulation 2021 reg 4(1)

Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Ordinance 2020 (Cap 78) ss 6, 10

Ha Siaw Shyong (KP Lau and Ha Advocates) for the applicant.

Mcwillyn Jiok (Senior Legal Officer, Sarawak State Attorney General's Chambers) for the first respondent.

Jessica Lee Suk Kiun (Federal Counsel, Attorney General's Chambers) for the second respondent.

Christopher Chin JC:

THE APPLICANT'S APPLICATION

[1] The applicant sought in encl 1 leave for judicial review under O 53 r 3 of the Rules of Court 2012 ('the ROC').

(a) a declaration that the first respondent's and/or the second respondent's decision to extend the period to be excluded from the calculation of the time for handing over vacant possession of a housing accommodations and the liquidated damages for the failure of the developer to hand over vacant possession of a housing accommodation under reg 4(1) of Temporary Measures for Reducing the Impact of Coronavirus Disease

2019 (Covid-19) (Housing Development (Control and Licensing)) Regulation 2021 to 17 March 2022 vide Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) (Housing Development (Control and Licensing)) (Extension of Period) Notification 2021 dated 22 September 2021 ('the decision') is an illegality, an abuse of power, an error of law, invalid, unreasonable and/or unfair and thereby is null and void; and

(b) an order of certiorari to quash the decision.

ORDER 53 R 3 LEAVE NOT GRANTED

[2] On the 4 March 2022 this court, upon hearing the applicant including counsels from the State Attorney General's Chambers as well as from the Jabatan Peguam Negara Malaysia, refused leave and stated (as extracted from the notes of proceedings that day, paraphrasing):

This is an application under Enc 1 for leave for judicial review under Order 53 of the Rules of Court 2012. The concern of the applicant is the alleged decision to extend the period under the Covid Ordinance 2020 up to 17.3.2022.

I have perused:

Encs 1 & 2, the Notice of Application and the Statement; Enc 3 AIS of the applicant.

Enc 7 Submission of the applicant.

Enc 11 Submission of the Respondents.

Enc 13 Reply Submission of the applicant.

While I am aware that the threshold for granting leave is low I must nevertheless be satisfied that the application is not, for want of a better description, 'frivolous'.

I have noted the main ground of challenging the impugned decision is not that the discretion was wrongly exercised but that it was, illegal, abuse of power, error and unreasonable.

Without going into detail on the exercise of a discretion by the authority I note on a cursory reading of the encls:-

— I am not convinced the Developer has been unjustly enriched;

— The impugned decision was to assist not only the developer but also the purchaser by preventing any delayed payment of instalments towards the purchase price to constitute a breach or attract interest;

— The burden of the purchasers vis-a vis the financiers or banks were eased by measures imposed by BNM, the Central Bank, via a moratorium of instalments and interests during the period concerned;

— The impugned decision was not specific to the Hann's residence only but across the board to all housing projects as can be seen in annexures HSS 3 and HSS 4 exhibited to Enc 2.

— The circumstances generated by the Covid-19 pandemic which necessitated the State Legislature to enact these unusual and exceptional provisions to protect not only the developers but also the purchasers. While I sympathize with the applicant, in the circumstances, I am not satisfied that the threshold for leave has been met, Leave applied for in Encs 1& 2 is denied with no order as to costs.

[3] The applicant has appealed to the Court of Appeal against the decision of this court in not granting leave under O 53 r 3 of the ROC. The following are the grounds of this court's decision made on the 4 March 2022.

BRIEF FACTS

[4] The following facts are gleaned from the statement supporting the application for leave for judicial review.

[5] The applicant, as purchaser, signed a sale and purchase agreement dated 18 April 2017 ('S&P') with one, Musyati Development Sdn Bhd (as 'developer') for the purchase of one unit of residence described as Parcel Unit A-13A-15 located on Lot 660 Block 7 Sibu Town District ('the parcel') in a project called 'Hann's Residence' ('the project'). The parcel was to have been handed over to the applicant as the purchaser on or before the 30 December 2019 ('the handover date').

[6] In March 2020 the nation went into lockdown because of the Covid-19 pandemic where hardly any corner, person or business in the State of Sarawak was spared its deadly and devastating tentacles.

[7] The State Government of Sarawak, in line with the rest of the nation enacted the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Ordinance 2020 ('the Covid Ordinance').

[8] By s 10 of the Covid Ordinance the first respondent who is the Minister for Local Government and Housing, Sarawak is conferred the power to provide measures to reduce the impact of the Covid-19 disease. Section 6 of the same Covid Ordinance empowers the first respondent to extend any period so allowed by notification in the State *Gazette*.

[9] The first period of extension of time allowed by the first respondent under the Covid Ordinance was from the 18 March 2020 to the 31 August 2020 ('the first period'). Such period was for:

the period to be excluded from the calculation of the time for handing over vacant possession of a housing accommodation and the liquidated damages for the failure of the developer to hand over vacant possession of a housing accommodation;

through reg 4(1) of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Regulations 2021.

[10] The first respondent is a Ministry under the second respondent, the State Government of Sarawak.

[11] It is common knowledge that the pandemic persisted and abated gradually in a manner which the authorities were only discovering with each new daily development of knowledge of the deadly virus.

[12] Then, the first respondent under s 10 of the Covid Ordinance, by a notification dated 22 September 2022 extended the first period from 1 September 2020 to 17 March 2022 ('the second period').

[13] The basis of the application for judicial review is founded on the applicant's allegation to this court that the notification dated on 22 September 2022 to allow the second period ('the impugned decision') was, in the words of the applicant:

> is an illegality, an abuse of power, an error of law, invalid, unreasonable and/or unfair.

NO COMPLAIN ABOUT THE FIRST PERIOD

[14] It is immediately apparent as well as significant for the purposes of this leave application that the applicant has no quarrel with the first period. His complaint with regard to the impugned decision is restricted to the second period of exclusion only.

SUMMARY OF THE GROUNDS OF THE APPLICANT FROM ENCL 2 (STATUTORY STATEMENT)

[15] In support of his statutory statement in encl 2 the applicant advanced the following grounds in support of his contention:

(a) during the second period the nation was already in the recovery phase;

(b) the impugned decision was not justifiable as the developer was still able to continue construction and thus the second period allowed an unjust enrichment to the developer;

(c) the developer did not stop construction work as evidenced by their periodical posts published by them on social media;

(d) the impugned decision was made at the expense of housing purchasers. This is particular so because before the commencement of the first period (18 March 2022) the handover date for the parcel (30 December 2019) had already lapsed;

(e) that the respondents had failed to consider that the construction industry was still running during the exclusion periods. This was evidenced by the fact that even during the first and second periods of exclusion the developer had continued to make progress claims against the purchasers towards the purchase price of the housing accommodation supported by architect's certified progress of works;

(f) that whereas the first period was allowed retrospectively the impugned decision for the second period was prospective and hence speculative and assuming that developers would be affected up to the end of the second period, that is the 17 March 2022;

(g) the first respondent had failed to consider and balance the interest of the purchasers whose statutory rights should also be equally be protected; and

(h) that developers can continue to construct with an extension of time of two years to complete the project but all the while the purchasers had 'serve their monthly instalments' (presumably for housing loans with banks) but could not take possession of the housing accommodation.

ORDER 53 R 3 OF THE RULES OF COURT 2012

[16] The law of judicial review has received regular comment and elucidation particularly to its purpose and extent and a recent expose can be found in the Federal Court's decision in *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)* [2022] 2 MLJ 356; [2022] 3 CLJ 339 where Tengku Maimun Tuan Mat, Chief Justice of Malaysia ruled and paras 45–47:

> Judicial review is a core tenet of the rule of law which is inextricably linked to the notion of constitutional supremacy in a democratic form of Government. This was because a core feature of the rule of law is the doctrine of separation of powers, a corollary to which is the concept of check and balance. Judicial review — whether constitutional review or statutory review — is a fundamental aspect of check and balance and is the vehicle through which the judicial branch of Government can perform its constitutional function vis a vis the other branches of Government. The judicial power of the Federation which includes judicial review (constitutional and statutory) is vested by constitutional design solely in the two High Courts.

[17] The procedure for the application for judicial review is provided in O 53 of the Rules of Court 2012. However, as a filter against frivolous, vexatious and unmeritorious applications, leave need to be first granted on

application to the High Court and only when leave has been granted will the substantive application be heard. Hence, O 53 r 3 stipulates:

Leave (O 53, r 3)

(1) An application under this Order shall not be made unless leave therefore has been granted in accordance with this rule.

(2) An application for leave must be made ex parte to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

(4) The Judge may, in granting leave, impose such terms as to costs and as to the giving of security as he thinks fit.

(5) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

(6) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

(7) The Court may, upon an application, extend the time specified in rule 4(1) and if it considers that there is a good reason for doing so P.U. (A) 267.

(8) An application to extend time must be served on all respondents and shall be heard inter partes.

TEST FOR LEAVE

[18] The test for granting leave was discussed by the Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296 at p 303; [2012] 4 CLJ 478 at p 488, paras F-G whereby Suriyadi FCJ delivering the judgment of the court said:

... leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, *an arguable case in favour of granting the relief* sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged. (Emphasis added.)

[19] In *Mkini Dotcom Sdn Bhd & Ors v Chief Judge of Malaya & Ors* [2016] 8 MLJ 357 at p 367; [2015] 9 CLJ 459 at p 466 Justice Asmabi Mohamad J (as she then was) said:

It is settled law, the function of the court in exercising its power to grant leave for

judicial review is to sieve through the application before it by examining the facts and the law and decide if the case is one which is frivolous and or one which merits further argument on the substantive motion. In exercising this function the court is guided by the principles laid down by the Court of Appeal in England in *R v Secretary of State for Home Department, ex parte Rushkanda Begum* [1990] Crown Office Digest 109, Dip as follows:

(a) if it is clear to the judge that there is a point for further investigation on a full inter parte basis with all evidence as is reasonably necessary on the facts and all such arguments on the law then leave ought to be granted;

(b) if the judge hearing the leave application is satisfied that there is no arguable case the judge should dismiss the application for leave to move for leave for judicial review;

(c) if the judge is not really sure whether there is or is not an arguable case, the judge may invite the putative respondent to attend and submit as to whether or not leave ought to be granted; and

(d) in exercising the powers in an inter parte leave application the test applicable by the court must be the same approach as that as the test adopted in deciding whether to grant leave to appeal against the arbitrator's award. The court has to consider the facts and law before it and ask itself whether the court is satisfied that there is a case fit for further consideration or otherwise.

[20] Hence to obtain leave the applicant must show that his application is not frivolous or vexatious (*Mohamed Nordin bin Johan v Attorney General Malaysia* [1983] 1 MLJ 68). Further, the applicant has to show that there is an arguable case for granting the relief claimed (*MAS Golden Boutique Sdn Bhd v Md Zain bin Abu* [1999] 3 MLJ 201; [1999] 3 CLJ 610).

[21] At the leave stage it is not necessary for the court to delve into the merits of the case (*Tang Kwor Ham & 2 others v Pengurusan Danaharta Nasional Bhd & 5 others* (Civil Appeal No M-02–644–03) (unreported)). The applicant must act in the utmost good faith (*uberrimae fidei*) and make full frank disclosure. The principles concerning disclosure in an ex parte application for injunctive relief likewise applies in such leave application for judicial review under O 53 (see *Co-operative Central Bank Ltd (in receivership) v Rashid Cruz bin Abdullah & Ors* [2004] 1 MLJ 626).

[22] The threshold at the leave stage is now low. Whether leave ought to be granted would depend on the applicant's statutory statement which has to set out the relief sought and the grounds for such application. The rule that the applicant is precluded from relying on what has not been pleaded or disclosed in his pleading's applies to such statement.

DOES THE APPLICATION CLEAR THE THRESHOLD FOR LEAVE? A

[23] It is now necessary to apply the above tests against facts elucidated by the applicant in his statutory statement supporting his O 53 application.

Is the discretion exercised under the Covid Ordinance an 'illegality, an abuse of power, an error of law, invalid, unreasonable and/or unfair' as alleged? B

[24] While judicial review is a means for the judicial arm in a democratic government to provide a check and balance on Executive decisions and discretion, the circumstances in which a law is enacted and when a discretion is exercised by the Executive are a relevant and important considerations in deciding whether the Executive had crossed the line. C

[25] The Covid-19 pandemic is a case in point. The severity of the affliction was not known and not understood. There was no cure or certainty of vaccinated protection then as well as now. The Executive had to do something and in this case they did what other countries did and on the advice of world health bodies. Till today there is no definitive cure and the death toll caused by this virus continues to mount. In the early days of this pandemic the country was put on a lockdown to arrest the spread of the virus. The entire country in both the private and public sectors came to a standstill. Contractual promises at every level of society and in any profession were being breached through circumstances beyond the control of anyone. Developer's progress of works was hampered by lack of labour, restricted working protocols, break in the supply chain for building materials are but a few of the numerous examples of hurdles faced. This afflicted not only the developer but the numerous sub-contractors engaged in the construction industry such as electricians, plumbers, builders, labour suppliers, sewerage and other skills necessary to construct and complete a high-rise development such as the project with substantial common facilities. D E F G

[26] On the purchaser's plate was reduction or absence of income due to cessation of employment, leading to a reduced ability to pay purchase consideration for the dwelling unit purchased or to service bank loans. H

[27] It is against this backdrop that the Covid Ordinance and the exclusion periods allowed in the first respondent's discretion, must be tested. It is a logistic impossibility for the first respondent to go into minute detail in each residential project to grant, limit or disallow tailor-made exclusions for every facet of contract or sub-contract in the building industry. There are hundreds if not thousands of housing projects suffering retarded progress of works at the relevant time. I

[28] Regrettably and understandably the first respondent's discretion necessarily had to be one which cuts across the entire landscape of the residential property development industry. It is to protect the industry and ultimately also protect the purchasers. The allowance and period exclusions allowed by the Covid Ordinance was to give every facet of industry, breathing space, or, sick leave, while the nation grapples to rein in the adverse health effects of the virus.

[29] Given these circumstances, and that the fact that the first respondent had regulatory powers over the development industry it is difficult to see the Covid Ordinance and the impugned decision derived therefrom to be illegal. Just as the impugned decision has allegedly caused harm to the applicant, one has to consider the harm to the greater public had such impugned decision *not* been made.

The developer has been unjustly enriched

[30] This allegation on the part of the applicant is not substantiated and therefore can at best be viewed as a broad generalised assumption on his part. I would venture that the construction costs for a project escalates if there is any delay in the completion of construction. Some layman examples which causes an escalation of costs are:

(a) the Covid-19 pandemic squeezed supply (and delivery) of building materials which will result in the escalation of costs for such materials in our free economy by the laws of supply and demand;

(b) bridging and other loans taken up by the developer cannot be repaid as agreed with the lenders resulting in increased financing costs. While Bank Negara Malaysia had allowed a moratorium on loan repayments, this initiative was to aid principally property loan borrowers and to a limited extent only, commercial or industrial loans;

(c) delay in construction work corresponds with delayed progress claims of the purchase price from purchasers resulting in reduced cash flow for the developers who may need to take short term loans or face a vicious circle of exacerbated delays; and

(d) reduction in labour force corresponds with a reduction in construction efficiency. For example, no point having a crane operator if there are no supporting labour to support the loading and discharging process in the crane's operations.

[31] Against the few examples above it must be noted this totally unanticipated escalation of costs cannot be passed on to the purchaser by virtue of the provisions of the housing laws which were passed to protect purchasers

of housing accommodation in the State of Sarawak. No such allegation of increased purchase price was made by the applicant in this case. Such escalation of costs was absorbed by the developer and hence, if anything their profit margin would have been eroded rather than unjustly fattened.

[32] Hence the allegation by the appellant of unjust enrichment is not substantiated.

[33] If the applicant's contention is true that the developer could enrich itself by delaying the delivery of vacant possession of the parcel to the applicant, this is not borne out by the actions of the developer. The second period ended on the 17 March 2022 whereas, by his own admission, the applicant obtained delivery of vacant possession of the parcel on the 30 August 2021 (para 16 of encl 3) some six months before the expiry of the second period.

The applicant was selective in his complaint to the second period only but had no complaint about the first period of extension

[34] The applicant seeks a review on the impugned decision which involves only the second period and not the first period. He has indirectly condescended to the decision or discretion giving rise to the first period. The applicant must therefore be seen to be selective and that he has acknowledged that the discretion across the board for the first period was not tainted with illegality.

The impugned decision was made by way of a notification under subsidiary legislation under the Covid Ordinance. No allegation that the notification was made through an exercised of a discretion by the Minister concerned that was ultra vires the principal legislation — Covid Ordinance

[35] The notification is NOT an administrative decision. Whenever law is challenged, it must be on the ground that the law is substantively ultra vires or procedural ultra vires of the parent statute and/or constitution. However, none of these were the grounds of the applicant. The court has the jurisdiction to declare the notification to be invalid if it found that the first respondent had acted ultra vires the Ordinance. In *F Hoffmann-La Roche & Co AG and others appellants and Secretary of State for Trade and Industry respondent* [1975] AC 295, Lord Diplock decided that:

> My Lords, in constitutional law a clear distinction can be drawn between an Act of parliament and subordinate legislation, even though the latter is contained in an order made by statutory instrument approved by resolutions by both Houses of Parliament. Despite this indication that the majority of members of both Houses of the contemporary Parliament regard the order as being for the common weal, I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister who did so *acted out* with the legislative

A powers conferred on him by the previous Act of Parliament under which the order purported to be made ... (Emphasis added.)

The applicant's complaint is actually on the diminished liquidated damages

B **[36]** The applicant paid the booking fee for the parcel on the 31 December 2015. Although the S&P was stamped the 18 April 2017, the time for delivery of vacant possession of the (parcel was three years from the date of the payment of the booking fee, that is by the 31 December 2019). Hence, the developer was already late in the delivery of vacant possession when the first period C commenced (18 March 2020 to 31 August 2020) by two months and 18 days. Delivery of vacant possession by the developer to the applicant actually occurred on the 30 August 2021 (within the second period of 1 September 2020 to 17 March 2022) as admitted in the affidavit in support by the D applicant (encl 6).

[37] After the expiry of the first period (18 March 2020 to 31 August 2020) the first respondent granted the developer a specific period of exclusion from 1 September 2020 to 31 December 2020. The notification of the *gazetted* E second period occurred (1 September 2020 to 17 March 2022).

[38] Hence, the applicant's issue is that he lost out on additional liquidated damages for late delivery of vacant possession of the parcel from the end of the first period (31 August 2020) to the 30 August 2021 (when possession was F delivered).

[39] The argument of the applicant is centred on his loss of liquidated damages as a result of the decision of the first respondent and not evidencing *why* or *how* the discretion exercised by the first respondent was wrong not only G to him but to the public in general. This application can therefore be said to be motivated entirely by self-interest.

CONCLUSION

H

[40] Applying the tests for leave against the facts and arguments submitted by the applicant, and without going further into the other issues it is sufficient that the application in encl 1 does not merit leave as it is frivolous. I rule as I did on the 4 March 2022 that 'I am not satisfied that the threshold for leave has I been met, leave applied for in encls 1 and 2 is denied with no order as to costs'.

The application for leave of judicial review dismissed.

Reported by Mohd Kamarul Anwar